



EPA Settlement Agreement of Chesapeake Bay TMDL Compliance Litigation Discloses New Pennsylvania Enforcement Policies

On April 20, 2023, the Chesapeake Bay Foundation [announced](#) that a settlement agreement had been reached, subject to court approval, in federal litigation [filed by the states](#) of Maryland, Virginia, Delaware, the District of Columbia, and multiple environmental groups against the U.S. Environmental Protection Agency (EPA) seeking to compel enforcement of Pennsylvania's Chesapeake Bay nutrient and sediment reduction obligations under the Clean Water Act and agreements and orders issued pursuant thereto. *Chesapeake Bay Foundation, Inc. v. Environmental Protection Agency*, No. [1:20-cv-02529](#).

A separate suit captioned *State of Maryland v. Wheeler*, No. [1:20-cv-02530](#), [filed by the same states](#), was consolidated with, and all pleadings thereafter filed to, case No. 20-2529, effective November 23, 2020. That suit also requested enforcement against New York, but the request was dismissed by a May 2022 stipulation.

In relevant part, the settlement agreement states that "although the parties continue to disagree whether EPA's oversight role under Section 117 of the [Clean Water Act] is mandatory or discretionary, EPA has agreed to take certain actions set forth herein." The settlement terms include the following provisions:

- Within 60 days, EPA will compile and release data on administratively extended Pennsylvania NPDES General Permits ("PAG-13"). The PAG-13 General Permit form expired on March 15, 2023, with no EPA-approved substitute yet in its place. EPA will request from PA a "permit reissuance strategy" for all such permits.
- Within 120 days, EPA will update its MS4 (small municipal separate storm sewer system) permitting guide, last issued in July 2010.
- Within 60 days, EPA will "maintain or increase compliance-assurance activities" within PA's Tier I counties (Lancaster and York) and Tier II counties (Franklin, Lebanon, Cumberland, Centre, and Bedford) of "NPDES-permitted sources (including concentrated animal feeding operations ("CAFOs"), MS4s, and other NPDES-permitted facilities)." A prioritization scheme for such permitted sources is included as well.
- "Within sixty (60) days . . . EPA will issue a public statement of the Agency's planned maintenance or increase in compliance-assurance activities in Pennsylvania" and continue that process every 6 months. If "EPA determines that additional compliance-assurance activities are appropriate," such as "federal inspections, investigations, and/or compliance evaluations," EPA may, "in its discretion, respond to particular instances of noncompliance with actions including but not limited to notices of violation, notices of noncompliance, and administrative and judicial enforcement actions."
- Within 120 days, EPA will identify Animal Feeding Operations ("AFOs") as defined by [40 C.F.R. § 122.23\(b\)](#) in Tier I Counties that meet the regulatory criteria for designation found in [40 C.F.R. § 122.23\(c\)](#) and "if a significant contributor of nutrients and/or sediment to a water of the United



States, EPA will, at a minimum, confer with Pennsylvania to reduce the contributions from such AFO and about the possibility of Pennsylvania designating such AFO as a point source” under the NPDES permit system.

- “[B]eginning on March 21, 2024 and continuing until December 31, 2025, if EPA believes that Pennsylvania is not making sufficient progress toward its portion of the 2025 Goal,” EPA will “begin to evaluate AFOs in Tier II Counties” for the same purposes.
- Within 240 days, EPA will begin to evaluate additional PA discharge sources not presently subject to federal point source discharge regulations. EPA will “confer with PA, regarding the possibility of designating certain source or source categories as needing to obtain a point source permit.”

The settlement agreement also articulates EPA actions to be taken regarding state-assistance agreements and funding. The settlement agreement is yet to be court-approved and all time periods stated will commence upon the effective date of the agreement, i.e. court-approval.

For background, see [ALWR—Week of Sept. 11, 2020](#), “Lawsuits filed against EPA over PA and NY Chesapeake Bay Non-Compliance” and [ALWR—Week of May 22, 2020](#), “Three State Attorneys General Notify EPA of Intent to Sue Over Chesapeake Bay TMDL Non-Compliance of Pennsylvania and New York.”

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